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In the Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING,

Respondent

On Certiorari To The United States Court Of Appeals
For The Eleventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF ON BEHALF OF THE WOMEN'S BAR ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Women's Bar Association of Illinois, with consent of the Petitioner Elizabeth Hishon, moves this Honorable Court for leave to file its brief in support of the petition for certiorari. The Women's Bar Association of Illinois believes the questions presented in Ms. Hishon's petition to be of great importance as stated in its proposed brief which has been filed simultaneously with this motion.

Wherefore, the Women's Bar Association of Illinois requests leave of this Honorable Court to file its Amicus brief in support of the petition for certiorari.

Respectfully submitted,

.....

Susan M. Vance

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BRIEF OF THE WOMEN'S BAR ASSOCIATION OF ILLINOIS, AS AMICUS CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This brief is submitted by the Women's Bar Association of Illinois in support of the petition for certiorari. The Women's Bar Assocation of Illinois (hereinafter "WBAI") maintains the denial of the rights guaranteed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, to women and other minority professionals who are employed by partnerships is an unlawful exclusion not contemplated by Congress or supported by the language or history of Title VII.

INTEREST OF AMICUS

The WBAI was founded in 1914 for the purpose of promoting and fostering the interests and welfare of women attorneys and maintaining the honor and dignity of the legal profession. The WBAI has over 700 members who practice in all areas of the law, and whose ages range from newly admitted attorneys in their twenties to attorneys in their eighties who have been in practice over fifty years. Since its inception, the WBAI has actively monitored and often become involved in matters affecting the legal profession, women and woman attorneys. Throughout its history, WBAI members have been mindful that in 1872, Illinois resident Myra Bradwell was denied a license to practice law by the Illinois and United States Supreme Courts, for the sole reason that she was a woman. *Bradwell* v. *The State*, 16 Wall. 130 (1872).

The first major activity of the WBAI was its campaign to secure for women the right to vote. Through WBAI's efforts, Illinois was one of the first states to ratify the Nineteenth Amendment, only five days after Congress proposed it to the states. During the 1920's the WBAI repeatedly urged the Illinois legislature to pass a bill allowing women to serve on juries. When it became evident that the legislature would not enact such a proposal, the WBAI and other groups successfully had the measure adopted by a referendum vote of all Illinois citizens. Recently, the WBAI has been active in securing fair divorce legislation, ensuring that battered women have legal representation and has participated in a coalition of working women's groups to maintain the enforcement by federal agencies of Executive Order 11246, which prohibits discrimination by federal contractors.

STATEMENT OF FACTS

The respondent King and Spalding is a law firm which operates as a partnership, employing over one hundred lawyers. It was not until after Ms. Hishon's case was in court, that the century old firm had its first and only woman partner. Elizabeth Hishon was hired by King and Spalding as an associate in 1972. Pursuant to the firm's policy, she was considered for partnership in 1978. She was denied promotion to partner and that decision was reaffirmed upon reconsideration in May of 1979. The firm has an "up or out" policy. Therefore, upon being denied partnership, Ms. Hishon sought other employment.

Shortly after leaving the employ of the respondent, Ms. Hishon filed her Title VII complaint. The district court dismissed the complaint for lack of subject matter jurisdiction. The Court found Title VII to be inapplicable to partnership decisions, holding that "the coverage of the Act seems doubtful and obscure" and the defendant's constitutional right to freedom of association would suffer if Title VII applied. A divided panel of the Eleventh Circuit rejected the constitutional freedom of association holding, but affirmed the decision based upon its perception that a new partner is not an employee of a law firm partnership.

This statement of facts is somewhat truncated, due to an order of the Eleventh Circuit Court of Appeals sealing the record and briefs of the parties from inspection by anyone.

ARGUMENT

This Court has long held that rules of statutory construction are "subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out its particular cases the generally expressed legislative policy." *SEC* v. *Joiner Leasing Corporation*, 320 U.S. 344 (1943).

When confronted with cases questioning the coverage of Title VII, this Court has specifically admonished courts to "avoid interpretations . . . that deprive victims of discrimination of a remedy, without clear Congressional mandate." *County of Washington* v. *Gunther*, 452 U.S. 161, 178 (1981). The panel majority in *Hishon* v. *King and Spalding*, 678 F.2d 1022, (hereinafter "Hishon") ignored this instruction and created a major exception to Title VII not found in the language of the Act or supported by legislative history or prior judicial interpretation. The *Hishon* case, as applied, denies Title VII protection to women and minorities by permitting a business organized as a partnership to refuse to promote minority employees to partner for reasons prohibited by Title VII in making employment decisions.

In interpreting and applying the provisions of Title VII and similar statutes, this Court has engaged in three forms of analysis: it has looked at the plain meaning of the statutory language, *American Tobacco Co.* v. *Patterson*, ... U.S. ....., 102 S.Ct. 1534 (1982); searched the legislative history for Congressional debate defining the limits or pervasiveness of coverage, *North Haven Board of Education* v. *Bell*, ... U.S. ....., 102 S.Ct. 1912 (1982); or, when the language permits differing interpretations or

when Congressional intent is unclear, this Court has examined the interpretation placed on the statute by the agency charged with its execution, *National Labor Relations Board* v. *Hendricks County Rural Electric Membership Corp.*, 450 U.S. 964 (1981). Whichever form of analysis the Court adopts, the result favors Petitioner's assertion that Title VII does not exempt law firms and other employee owned businesses in their promotion decisions.

A. The Language of Title VII Protects all Individuals With Respect to Employment

To determine the coverage of Title VII by examining the language of the Act, the analysis set out by this Court in *American Tobacco Co.* v. *Patterson*, *supra*, provided that:

> . . . in all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." Thus "[a]bsent a clear expressed legislative intent to the contrary, the language must be ordinarily regarded as conclusive." [citations omitted.]

In this instance then, the initial inquiry must focus on the following statutory language:

> 42 U.S.C. §2000e(a) The term "person includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, *partnerships*, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers. (As amended) (emphasis added)
>
> §2000e(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any *agent* of such a person, but such term does not include (1) the United

States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (*and their agents*) shall not be considered employers. (As amended) (emphasis added).

§2000e-2(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (emphasis added)

* * *

There can be no argument, and indeed the majority panel in *Hishon* readily admitted, that §2000e(a) and (b) clearly provide that partnerships are employers covered by the prohibitions of Title VII. What the Circuit Court did not consider is that §2000(e)-2(a) is not limited to employees, but extends its protections to "any individual." If Congress had so intended, it could have easily limited the scope of the Act's coverage to employees only. However, in §2000(e)-2(a) it instead chose to cover employees, applicants for employment and individuals aspiring to promotion as partner. Had Congress wished the Act to only cover employees and applicants for employment, it could easily have done so, using just those simple plain words. It did not. The use of the word individual clearly signal-

an intention to cover a wider group of people in employment relationships, not merely employees.

A review of the variety and scope of the exclusions and exemptions Congress did make in Title VII's coverage gives further evidence that Ms. Hishon is an intended beneficiary of the Act. Excluded from coverage, and therefore not employers, are the following categories found at §2000e(a), persons having less than fifteen employees and agents, Indian tribes and bona fide private clubs. §2000e-1 excludes religious institutions with respect to the religious work of the institution and also eliminates employers in connection with the hiring of aliens outside the United States. Excluded from Title VII's definition of an unlawful employment practice is the refusal to hire or the discharge of members of the Communist Party, §2000e-2(f) and similar actions with regard to individuals who cannot obtain security clearances, if the national interest requires one, §2000e-2(g). With these many and varied exceptions, it is clear that had Congress wished to exclude the hundreds of thousands of individuals who are employed by businesses and professions historically organized as partnerships, it could easily have done so.

Since the enactment of Title VII, various employee owned businesses have asserted that their activities are excluded from coverage. Law firms originally contended that associate hiring should be a judicially created exception. That argument was rejected in *Kohn* v. *Royall, Koegel & Wells*, 59 F.R.D. (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2nd Cir. 1974). The same assertion that is made in this case, that of an implied exemption for partnership decisions was denied in *Lucido* v. *Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y. 1977). The Hishon Court termed "enlightening" the Seventh Circuit's discussion of whether Title VII applies to partnerships in *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977). In

Burke, the Seventh Circuit refused to count the partners in the partnership to arrive at the jurisdictionally required fifteen "employees." The Act, however, in §2000e(b), expressly states that agents are to be included in counting employees. This Court has long held that partners are agents when engaged in the business of the partnership. *Strang* v. *Bradner*, 114 US 555 (1855), *Latta* v. *Kilbourn*, 150 U.S. 524 (1893). Recently, an employee owned business asserted that shareholder preference in the determination of compensation and work assignment should be excluded because Title VII does not reach the sale of stock. *Bonilla* v. *Oakland Scavenger Company*, 51 L.W. 2301, (9th Cir. November 9, 1982). In *Bonilla*, the Court rejected that argument, finding that the shareholder preference plan, which favored those of Italian descent, was a condition of employment as defined by §2000e-2(a).

The language of the statute contains no exclusions for partnerships or other employee owned businesses, and the Courts have, until the *Hishon* decision, rejected the argument that the Courts should carve out such an exception to the Act.

B. The Legislative History Indicates That Congress Did Not Intend to Exclude the Professions.

The legislative history of Title VII which contains the most insight to its sex discrimination provisions is the debate and record surrounding the 1972 amendments. These offer a clear understanding of Congressional intent. The House Report statement of purpose which prefaces the 1972 amendments, found in *U.S. Code and Administrative News, 92nd Congress, 1972*, Legislative History, at p. 2140, reflects a concern that women were still being relegated to lesser positions despite the enactment of Title VII in 1964.

Among other statements, the following concern was expressed:

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

In 1972, the original exemption for school teachers and university professors was eliminated and coverage was extended to these professions. Proposed in the Senate, at the same time, was an amendment which would have exempted physicians and surgeons employed by public and private hospitals. Senator Jacob Javits, the senior Senator from New York, spoke out against the exclusion of any professionals and against that amendment in particular by stating:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water, that only the blue collar jobs and ditch-digging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
>
> * * *
>
> Yet this amendment would go back beyond decades of struggle and of injustice and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion—just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain—and thus lock in and fortify the idea that being a doctor or surgeon is just too good for members of a minority, and that they have to be subject to discrimination in respect to it, and the Federal law will not protect them. 118 Cong. Rec. 3802 (1972).

Thousands of women who aspired to professional careers were initially thwarted by the failure of professional schools to admit them. The dramatic increase in the number of women who have graduated from law school in the last two decades demonstrates that the removal of sex based barriers must precede full development of opportunity.

The American Bar Association Review of Legal Education, Fall 1981, lists the following statistics for women graduating from ABA accredited law schools.

1981	11,587
1979	9,735
1977	7,651
1975	4,546
1973	2,280

According to the most recent Department of Labor, Bureau of Labor Statistics figures, in 1981 there were 119,000 women physicians and dentists, 82,000 female judges and lawyers, and more than 300,000 women accountants. The Department of Labor Statistics also showed that the median annual earnings of a woman working full time in 1981 represented 59.8 percent of the earnings of a male in the same employment category. United States Department of Labor, Bureau of Labor Statistics, Employment and Earnings, November, 1982. In addition to lawyers, accountants and physicians, mortgage bankers and architects also work in professions historically organized as partnerships.

C. The Equal Employment Opportunity Commission Has Not Interpreted the Statute to Exclude Partnerships.

The third method of statutory construction this Court has used has been to examine the interpretation placed on the statute being litigated by the agency charged with its execution. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 450 U.S. 964 (1981). The agency charged with the administration of Title VII, the Equal Employment Opportunity Commission, has made its statutory interpretation of §2000e(a)(1) and (2) as applied to the facts most clear by its opposition, to the majority decision in this case. EEOC filed an amicus brief in support of *en banc* reconsideration of this case before the Eleventh Circuit.

In that brief, the EEOC adopted the *Lucido* v. *Cravath*, *supra*, standard as the correct analysis of Section 2000e-2 (a). The EEOC asserted, at page 8 of its brief, "As an associate, Ms. Hishon was indisputably the firm's employee, protected under Title VII from discrimination in the 'terms, conditions, or privileges of employment' (§703 (a)(1), 42 U.S.C. §2000e-2(a)(1), and the discriminatory deprivation of employment opportunities. 703(a) (2), 42 U.S.C. §2000e(a)(2)." Implicitly the EEOC recognized promotion to partner was the most crucial privilege of employment as an associate at King and Spalding. The EEOC alternatively supported dissenting Judge Tjoplat's analysis under King and Spalding's "up and out" policy. Under that analysis, Ms. Hishon's termination as an associate was an employment decision covered by the provisions of Title VII.

CONCLUSION

The Women's Bar Association of Illinois urges this Court to grant the petition for certiorari. If the Eleventh Circuit opinion is allowed to stand, it will signal to all employee owned businesses that, at this crucial juncture in the careers of the vast majority of women and minority professionals, these employers are free to deny genuine participation in professional enterprises to individuals on the basis of sex, race, religion and national origin rather than individual merit and achievement.

Respectfully submitted,

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